No. 22-5703

UNITED STATES COURT OF APPEALS
for the SIXTH CIRCUIT

DERIC LOSTUTTER, *et al.*

Plaintiffs-Appellants

v.

ANDY BESHEAR, in his official capacity as
GOVERNOR OF THE COMMONWEALTH OF KENTUCKY,

Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
No. 6:18-cv-00277

BRIEF OF GOVERNOR ANDY BESHEAR

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STATEMENT CONCERNING ORAL ARGUMENT

Plaintiffs request oral argument to address the merits of their First Amendment claim. Because this appeal concerns only Plaintiffs' failure to allege an actual injury in order to clear the jurisdictional hurdle of standing, oral argument is unnecessary. However, the Governor stands ready to present oral argument if this Court finds it beneficial.

STATEMENT OF THE CASE

On February 4, 2019, Plaintiffs and others filed the operative Fourth Amended Complaint against a former governor under 42 U.S.C. § 1983, alleging the voting rights restoration scheme in Kentucky violates the First Amendment because it provides unfettered discretion to the governor to restore civil rights and does not contain a limitation on the time to exercise that discretion. (Fourth Amended Complaint, RE 31, Page ID # 350-57.) They argue the restoration scheme – accomplished through the pardon power granted to the governor in the Kentucky Constitution – must adhere to constitutional procedures when officials "grant or deny licenses or permits to engage in First Amendment-protected . . . activity." (Motion for Summary Judgment, RE 46, Page ID#: 625.) They seek a declaration that the restoration scheme violates the First Amendment, as well as a permanent injunction enjoining the Governor from subjecting them to the restoration scheme and ordering the Governor to establish a new restoration

scheme that "restores the right to vote to felons based upon specific, neutral, objective, and uniform rules and/or criteria[.]" (Fourth Amended Complaint, RE 31 at 357-58.)

In Kentucky, voting rights may be restored by a pardon. KY. CONST. § 145. On December 12, 2019, newly-inaugurated Governor Andy Beshear issued Executive Order 2019-003, "Relating to the Restoration of Civil Rights for Convicted Felons[.]" The order automatically restored the voting rights of "offenders convicted of crimes under Kentucky state law who have satisfied the terms of their probation, parole, or service of sentence . . . exclusive of restitution, fines, and any other court-ordered monetary conditions." *Id*. The order does not automatically restore the voting rights of offenders convicted of violent crimes as defined by Kentucky statute, sex offenses, homicide, fetal homicide, first degree strangulation, human trafficking, second degree assault, assault under extreme emotional disturbance, treason, or bribery in an election. *Id*. Under the order, the voting rights of eligible offenders will be restored prospectively upon completion of their probation, parole or sentence. *Id*. Several former Plaintiffs voluntarily dismissed their claims upon the automatic restoration of their right to vote. (Order, RE 54, Page ID # 768.)

As a result of the order, on August 14, 2021, the District Court dismissed Plaintiffs' claims as moot. (Opinion and Order, RE 55, Page ID # 777.) This Court

reversed the District Court's decision on appeal. *Lostutter v. Kentucky*, No. 21-5476, 2021 WL 4523705 (6th Cir. Oct. 4, 2021). It found Plaintiffs' claims were not moot, declined Plaintiffs' request to reach the merits of their claims and remanded the case for further proceedings. *Id*. at *3.

On remand, the District Court dismissed Plaintiffs' claims for lack of standing. (Opinion and Order, RE 68, Page ID # 845-50.) Specifically, the District Court found "[t]he only injury Plaintiffs alleged is that they are harmed by the mere possibility of having a restoration application denied by the Governor." (*Id* at 849.) Plaintiffs failed to show "that the Governor's discretion has caused them any actual injury[.]" (*Id*.) As a result, the District Court found the alleged injury to be "entirely hypothetical and abstract[,]" and Plaintiffs lacked "standing to challenge the Commonwealth's felon reenfranchisement scheme[.]" (*Id*.)

SUMMARY OF THE ARGUMENT

For more than two centuries, the Kentucky Constitution has vested the Governor with the discretion to grant pardons. A pardon relieves a person of some or all of the legal consequences of a crime, including the inability to vote. Plaintiffs allege the use of the pardon power to restore the right to vote in Kentucky creates the risk that a Governor may relieve or not relieve felons of the inability to vote in a discriminatory or arbitrary manner in violation of the First Amendment.

The problem is Plaintiffs do not allege they have suffered discriminatory or arbitrary treatment. The mere risk of discriminatory or arbitrary treatment is not an actual injury to establish standing to sue. As a result, the District Court appropriately dismissed Plaintiff's claims for lack of standing.

Aside from the unmet jurisdictional burden, the First Amendment does not protect disenfranchised felons seeking a pardon. To find differently, would conflict with United State Supreme Court precedent and precedent of this Circuit finding that felons lack any fundamental interest in obtaining pardon.

ARGUMENT

I. Plaintiffs Do Not Have Standing To Challenge The Executive Pardon Power Because They Did Not Suffer An Injury By Its Existence Or Use.

A district court's dismissal of a claim for lack of standing is reviewed de novo. *Prime Media, Inc. v. City of Brentwood*, 485 F.3d 343, 348 (6th Cir. 2007) Article III of the United States Constitution only permits federal courts to hear actual cases and controversies. U.S. CONST. art. III, § 2. This limits the category of litigants empowered to maintain a lawsuit in federal court. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016). An actual case or controversy requires that the plaintiff "must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Id*. (citing *Lujan v. Defenders of Wildlife*, 504 U.S.

555, 560-61 (1992)). The plaintiff bears the burden of establishing each element. *Id*. (citing *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 231 (1990)).

The District Court held Plaintiffs failed to establish an injury in fact because they have not suffered any injury as a result of the Governor's discretion to issue pardons. (Opinion and Order, RE 68, Page ID # 849.) None of the Plaintiffs have alleged that they were denied relief from their inability to vote or that they were subject to a discriminatory or arbitrary act. Indeed, Plaintiffs allege as their only injury "the mere possibility of having a restoration application denied by the Governor." (*Id*.)

Contrary to Plaintiffs' argument that this does not matter because the District Court ruled on the merits anyway, the District Court explicitly stated it "only addresses the issue of Article III standing in this Opinion." (Opinion and Order, RE 68, Page ID # 846, n. 1.) Plaintiffs are also wrong in their alternative argument that the District Court erred by not addressing the merits because the standing analysis required the Court to resolve their First Amendment claims.

While Supreme Court cases have long held that a plaintiff need not first apply for and be denied a license in order to challenge the licensing scheme as violating the First Amendment by providing unbridled discretion to a government official, *see City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 755-56 (1988), those cases are narrow and distinguishable from this case. As the Court

noted in *Lakewood*, those cases rest on the understanding that "a licensing statute placing unbridled discretion in the hands of a government official . . . constitutes a prior restraint and may result in censorship." *Id*. at 756. (citing *Shuttlesworth v. City of Birmingham,* 394 U.S. 147, 151 (1969); *Cox v. Louisiana,* 379 U.S. 536 (1965); *Staub v. City of Baxley,* 355 U.S. 313, 321–322 (1958); *Kunz v. New York,* 340 U.S. 290, 294 (1951); *Niemotko v. Maryland,* 340 U.S. 268 (1951); *Saia v. New York,* 334 U.S. 558 (1948)). In particular, those cases recognize that "the mere existence of the licensor's unfettered discretion, coupled with the power of prior restraint, intimidates parties into censoring their own speech, even if the discretion and power are never actually abused." *Id*. at 757.

In *Lakewood*, the Court analyzed a city ordinance requiring newspapers to apply annually for newsrack licenses. *Id*. at 759. The Court reasoned that because the ordinance required applications for multiple licenses over time, "the licensor does not necessarily view the text of the words about to be spoken, but can measure their probable content or viewpoint by speech already uttered." *Id*. (citation omitted). The "speaker in this position is under no illusion regarding the effect of the 'licensed' speech on the ability to continue speaking in the future." *Id*. at 759-60. Thus, the Court in *Lakewood* recognized that a facial challenge may be appropriate when the speaker is "pressured to conform their speech to the licensor's unreviewable preference." *Id*. at 760. On the other hand, the Court noted

that "laws of general application that are not aimed at conduct commonly associated with expression and do not permit licensing determinations to be made on the basis of ongoing expression or the words about to be spoken, carry with them little danger of censorship." *Id.* at 760-61.

Importantly, *Lakewood* did not minimize the importance of an actual injury. *See Prime Media,* 485 F.3d at 351 ("[T]he requirement of an actual injury is not obviated by a prior restraint claim.") Plaintiffs must still show actual injury by being "'subject to a prior restraint on protected expression[.]'" *Phillips v. DeWine*, 841 F.3d 405, 416 (6th Cir. 2016) (citation omitted). *Lakewood* recognizes that "the prospect of prior restraint and resulting self-censorship can itself constitute the required actual injury" under Article III. *Prime Media*, 485 F.3d at 351. But, Plaintiffs lack standing if they fail to allege "'their speech . . . was altered or deterred in any way[.]'" *Phillips*, 841 F.3d at 415 (citation omitted).

Here, no prior restraint exists and none was alleged. Plaintiffs do not allege the pardon power alters or deters their ability to vote. They cannot vote because they committed felonies. *See* KY. CONST. § 145. Unlike the scheme in *Lakewood*, a pardon is not an ongoing licensing scheme that allows the Governor to consider Plaintiffs' prior expression. It is a one-time act of clemency unassociated with Plaintiffs' prior expression. In other words, it carries no danger of self-censorship. The District Court correctly found that Plaintiffs failed to allege an actual injury

because the "mere possibility of having a restoration application denied by the Governor" is not a prior restraint. Because Plaintiffs failed to allege an actual injury, the District Court lacked jurisdiction to address their First Amendment claims and appropriately dismissed their claims. This Court should affirm.

II. Kentucky's Restoration Scheme Does Not Violate the First Amendment.

Irrespective of the District Court's jurisdictional holding, any error by the Court was harmless because Plaintiffs' claims have no basis in the First Amendment. *Richardson v. Ramirez*, 418 U.S. 24, 53 (1974) ("Much more recently we have strongly suggested in dicta that exclusion of convicted felons from the franchise violates no constitutional provision."); *see also Hand v. Scott*, 888 F.3d 1206, 1212 (11th Cir. 2018) ("[E]very First Amendment challenge to a discretionary vote-restoration regime we've found has been summarily rebuffed.") (citing *Kronlund v. Honstein*, 327 F.Supp. 71, 73 (N.D. Ga. 1971); *Farrakhan v. Locke*, 987 F.Supp. 1304, 1314 (E.D. Wash. 1997); *Johnson v. Bush*, 214 F.Supp.2d 1333, 1338 (S.D. Fla. 2002) (King, J.), aff'd sub nom. *Johnson*, 405 F.3d at 1214; *Hayden v. Pataki*, No. 00 Civ. 8586 (LMM), 2004 WL 1335921, at *6 (S.D.N.Y. June 14, 2004); *Howard v. Gilmore*, 205 F.3d 1333 (unpublished table decision), 2000 WL 203984, at *1 (4th Cir. Feb. 23, 2000)). Plaintiffs' attack is facial; therefore, it raises only legal questions. *See Kansas Judicial Review v. Stout*, 519 F.3d 1107, 1118 (10th Cir. 2008) ("[A] first amendment challenge to the

facial validity of a statute is a strictly legal question; it does not involve the application of the statute in a specific factual setting." (citation omitted)). Because no facts need developing, no harm occurs by dismissal of the case if the claims lack any legal merit. Fed. R. Civ. P. 61 ("At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights."). Under established precedent, Plaintiffs' claims lack merit.

Plaintiffs' First Amendment arguments conflict with Supreme Court precedent. In *Connecticut Board of Pardons v. Dumschat*, 452 U.S. 458 (1981), for example, an inmate challenged the parole board's failure "to provide him with a written statement of reasons for denying his commutation" as a violation of the Fourteenth Amendment's Due Process Clause. *Id.* at 461. The Supreme Court rejected this claim, holding that "pardon and commutation decisions have not traditionally been the business of courts; as such, they are rarely, if ever, appropriate subjects for judicial review." *Id.* at 464. An inmate's right to clemency, the Court emphasized, is "simply a unilateral hope" that rests on "purely subjective evaluations and on predictions of future behavior by those entrusted with the decision." *Id.* at 464-65. A plurality of the Court later explained that "the heart of executive clemency" is "to grant clemency as a matter of grace, thus allowing the executive to consider a wide range of factors not comprehended by earlier judicial proceedings and sentencing determinations." *Ohio Adult Parole Auth. v. Woodard*,

523 U.S. 272, 280-81 (1998) (plurality). The plurality affirmed that "[u]nder *any* analysis, the Governor's executive discretion need not be fettered by the types of procedural protections sought by respondent." *Id*. at 282 (emphasis added).

Dumschat and *Woodard* reject Plaintiffs' argument that a hypothetical risk of discriminatory or arbitrary treatment raises constitutional issues. Though each deal with the Fourteenth Amendment, if the Fourteenth Amendment does not require specific procedures to govern the discretion afforded in the pardon process, Plaintiffs cannot argue for similar procedures under the First Amendment. *See Hand*, 888 F.3d at 1209 ("If a state pardon regime need not be hemmed in by procedural safeguards, it cannot be attacked for its purely discretionary nature.")

Furthermore, Plaintiffs' claims would require overruling precedent of this Court. This Court has plainly rejected the assertion of a constitutionally protected interest in a state restoration scheme. In *Johnson v. Bredesen*, 624 F.3d 742, 744 (6th Cir. 2010), plaintiffs challenged Tennessee's restoration scheme, which conditioned restoration on full payment of restitution and child support. Rejecting an equal protection challenge and a Twenty-Fourth Amendment ban on poll taxes challenge, this Court held: "Having lost their voting rights, Plaintiffs lacked any fundamental interest to assert." *Id*. at 746 (citing *See Wesley v. Collins*, 791 F.2d 1255, 1261 (6th Cir.1986) ("It is undisputed that a state may constitutionally disenfranchise convicted felons, and that the right of felons to vote is not

fundamental."). This Court further recognized that "Plaintiffs have no legal claim" as it pertains to "restoration of a civil right." *Id*. at 748-49. Put another way, "the re-enfranchisement law at issue does not deny or abridge any rights; it only restores them. As convicted felons constitutionally stripped of their voting by virtue of their convictions, Plaintiffs possess no right to vote . . . ." *Id*. at 751.

Like *Dumschat* and *Woodard*, *Johnson* controls even though Plaintiffs here couch their fundamental interest as protected by the First Amendment, rather than the Fourteenth Amendment. Plaintiffs' claim that "conditioning the employment of a fundamental constitutional right on the exercise of unfettered official discretion and arbitrary decision-making violates the First Amendment to the United States Constitution." (Amended Complaint, RE 31, Page ID # 336.) But this cannot square with *Johnson*, because, "[h]aving lost their voting rights, Plaintiffs lack any fundamental interest to assert." 624 F.3d at 746. Moreover, in *Johnson*, the Court addressed actual discrimination within a voting rights restoration scheme – wealth discrimination. Here, Plaintiffs do not allege the scheme *actually* discriminates, just that it poses the "risk" of discriminatory or arbitrary treatment.

Plaintiffs' arguments to the contrary rest on case law interpreting licensing schemes, which they argue bear no difference to the pardon power. They are wrong. As the District Court noted, a license is "permission, usually revocable, to commit some act that would otherwise be unlawful." (Opinion and Order, RE 68,

Page ID # 847 (citing *Licensing, Black's Law Dictionary* (11th ed. 2019)).) A pardon, on the other hand, is "[t]he act . . . of officially nullifying punishment or other legal consequences of a crime." (*Id.* (citing *Pardon, Black's Law Dictionary* (11th ed. 2019)).) Thus, while a license may grant an individual the ability to engage in First Amendment activity, a pardon may relieve a felon of the deprivation of a First Amendment activity. To accept Plaintiffs' comparison would mean also finding prosecutorial discretion to violate the First Amendment because it is the conviction that ultimately disenfranchises the individual. *See U.S. v. Brimite*, 102 Fed. App'x 952, 955 (6th Cir. 2004) (recognizing that prosecutors maintain "great discretion when determining which cases to prosecute[]").

Plaintiffs' assertion that restoration of civil rights "is manifestly *not* a pardon," (RE 16, Page 50), does not shore up their faulty comparison. The restoration of the right to vote *is* a pardon under the plain language of Section 145 of the Kentucky Constitution. In pertinent part, Section 145 provides:

> Every citizen of the United States of the age of eighteen years who has resided in the state one year, and in the county six months, and the precinct in which he offers to vote sixty days next preceding the election, shall be a voter in said precinct and not elsewhere but the following persons are excepted and shall not have the right to vote.
>
> > 1. Persons convicted in any court of competent jurisdiction of treason, or felony, or bribery in an election, or of such high misdemeanor as the General Assembly may declare shall operate as an exclusion from the right of suffrage, but persons hereby excluded may be restored to their civil rights by executive pardon.

KY. CONST. § 145. The words "executive pardon" can only mean one thing. Under that plain language, a person who has lost his or her right to vote because of a conviction specified in Section 145 of the Kentucky Constitution may have that right to vote restored by executive pardon, through the Governor's pardon power under Section 77 of the Kentucky Constitution.

Regardless, any distinction Plaintiffs attempt to draw is immaterial because the Governor's discretion to restore the right to vote does not regulate First Amendment rights. *See Johnson*, 624 F.3d at 746 ("[h]aving lost their voting rights, Plaintiffs lack any fundamental interest to assert.") A license, on the other hand, may regulate First Amendment activity.

Finally, Plaintiffs allege that the First Amendment also requires the Governor to act on a pardon application within a defined time period. But this argument fails for the same reasons listed above. The Governor's discretion necessarily includes the ability to act or not act when he sees fit. Moreover, As Justice O'Connor wrote for the Ninth Circuit, "[O]nce a felon is properly disenfranchised a state is at liberty to keep him in that status indefinitely and never revisit that determination." *Harvey v. Brewer*, 605 F.3d 1067, 1079 (9th Cir. 2010).

CONCLUSION

Standing requires a plaintiff to allege an actual injury, and Plaintiffs here have not suffered any injury. As a result, the District Court appropriately dismissed

their First Amendment claims. Alternatively, the First Amendment does not protect a lawfully disenfranchised felon's ability to seek restoration of their right to vote through the executive pardon power. Plaintiffs' arguments would require this Court to overrule established precedent and eventually limit the discretion afforded to prosecutors. For the reasons set forth herein, this Court should affirm the District Court's Opinion and Order dismissing Plaintiffs' claims.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with Fed. R. App. P. 32 and the type-volume limitation because it contains 3,209 words and uses proportionally spaced typeface of Times New Roman in 14 point.

/s/ Taylor Payne
Taylor Payne

CERTIFICATE OF SERVICE

I hereby certify that on December 20, 2022, I electronically filed the foregoing Response via the Court's CM/ECF system, causing all counsel of record to be served.

/s/ Taylor Payne
Taylor Payne

ADDENDUM

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